



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

July 28, 2003

Ms. Elizabeth Lutton
Senior Attorney
City of Arlington
P.O. Box 231
Arlington, Texas 76004-0231

OR2003-5171

Dear Ms. Lutton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 184901.

The City of Arlington (the "city") received three requests from the same requestor for the following information pertaining to five named officers:

- A copy of the officer's personnel file, to include all disciplinary action, awards, and reprimands given to him.
- A copy of all training records and certificates received.
- A copy of his Internal Affairs file, if kept separately from the personnel file.
- A copy of all material dealing with hiring of the officer, initial interview, oral review board and all other exams (psychological, polygraph) that were conducted prior to hiring the officer.

You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.115, 552.117, 552.119, 552.122, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

¹We assume that the sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we address your claim that the requested information includes medical records, which are confidential under the Medical Practice Act (the "MPA"). Occ. Code §§ 151.001-165.160. Section 159.002 of the Occupations Code provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We agree that some of the documents at issue, which we have marked, constitute medical records that may only be released in accordance with the MPA.

We address your claim regarding section 552.103 next because it is the broadest. This section provides:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its

receipt of the request for information *and* (2) that the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

You represent to this office that the requested information relates to a pending criminal prosecution and indicate that the prosecution was pending when the city received this request for information. However, you do not inform us, nor is it apparent from the submitted information, that the city is a party to the pending criminal litigation. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). In such a situation, we require an affirmative representation from the prosecuting attorney representing the governmental body that is a party to the litigation that he or she wants the submitted information withheld from disclosure under section 552.103. In this instance, you have not provided any such representation. Furthermore, we note that you have failed to explain how the requested personnel files relate to the pending prosecution that you mention. In addition, we note that the offense report relating to the prosecution gives no indication that three of the five officers whose files have been requested are in any way connected to the arrest or prosecution. Thus, we conclude that you have failed to establish that the city is a party to the pending litigation or that the information at issue is related to that litigation. Therefore, no information may be withheld pursuant to section 552.103.

We turn now to your other arguments concerning the requested information. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information that is confidential under federal law. Section 6103(a) of title 26 of the United States Code provides that tax return information is confidential. *See* 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); *see also* Open Records Decision No. 600 (1992); Attorney General Op. MW-372 (1981). Accordingly, the department must withhold the officers' W-4 forms pursuant to section 552.101 in conjunction with section 6103(a). Employment Eligibility Verification, Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that an I-9 form and "any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of the officers' I-9 forms in this instance would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that such documents are confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

Section 552.101 also encompasses information made confidential by state statutes. Section 58.007 of the Family Code, which makes confidential juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997, provides in part:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult files and records;

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Section 51.02(2)(A) of the Family Code defines "child" for purposes of section 58.007 as a "person who is . . . ten years of age or older and under 17 years of age."

Having reviewed the information submitted as Exhibit 14, we agree that report number 010012003 involves allegations of juvenile conduct that violates penal statutes and that occurred after September 1, 1997. Thus, this report is subject to section 58.007. Because none of the exceptions in section 58.007 appear to apply, this report is confidential in its entirety in accordance with section 58.007(c) of the Family Code and must be withheld from disclosure pursuant to section 552.101 of the Government Code.

We note, however, that the remaining information submitted as Exhibit 14 includes practical exercises given to police applicants in order to test their skills at filling out paperwork. Because the information in these exercises appears to be fictional in nature, it is not confidential under section 58.007. Furthermore, while the remaining information in this exhibit appears to pertain to actual living individuals, none of those individuals is identified. Because specific juvenile suspects are not identified, we find that this information is not made confidential under section 58.007 of the Family Code, and it may not be withheld on that basis.

Section 552.101 also encompasses information protected by section 261.201(a) of the Family Code, which provides in part:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Having reviewed the submitted information, we agree that a single narrative contained in Exhibit 15 constitutes a file, report, record, communication, or working paper used or developed in an investigation under chapter 261 or in providing services as a result of an investigation. You do not inform us that the investigating agency has adopted a rule that governs the release of this type of information. We therefore assume no such rule exists. Given this assumption, we conclude that this narrative, which we have marked, is confidential pursuant to section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute). Accordingly, the city must withhold this information in its entirety under section 552.101 of the Government Code as information made confidential by law.

Section 552.101 of the Government Code also encompasses laws that make criminal history record information ("CHRI") confidential. CHRI "means information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions" but does not include "driving record information maintained by [the Department of Public Safety ("DPS")] under Subchapter C, Chapter 521, Transportation Code." Gov't Code § 411.082(2).

Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Under chapter 411 of the Government Code, a criminal justice agency may obtain CHRI from DPS or from another criminal justice agency. *Id.* §§ 411.083(b)(1), .087(a)(2), .089(a). However, CHRI so obtained is confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, you must withhold any CHRI that you have in your possession that falls within the ambit of these state and federal regulations.

You also assert that some of the requested information is made confidential under section 1701.306 of the Occupations Code. This section, which makes confidential declarations of medical condition and of psychological and emotional health, provides in part:

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. *A declaration is not public information.*

Occ. Code § 1701.306(a), (b) (emphasis added). While this section provides that a declaration itself is not public information, it does not make confidential the results of the declaration, a mere reference to a declaration, or information taken from the declaration and used in another context. Thus, these types of information are not confidential under this statute and may not be withheld under section 552.101 on this basis. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express and cannot be implied), 478 at 2 (1987) (language of confidentiality statute controls scope of protection), 465 at 4-5 (1987) (statute explicitly required confidentiality). We have marked the information that must be withheld under section 552.101 pursuant to section 1701.306 of the Occupations Code.

As you point out, the requested documents also include information obtained in the course of conducting a polygraph examination, the release of which is prohibited by law. Section 1703.306 of the Occupations Code provides that “a person for whom a polygraph examination is conducted . . . may not disclose information acquired from a polygraph examination” except to certain categories of people. Because the requestor does not fall within any of the enumerated categories, pursuant to section 552.101 and section 1703.306, you must withhold the polygraph information that we have marked.

Section 552.101 also encompasses the common law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: an individual’s criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (citing *United States*

Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989)), personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Having reviewed the submitted information, we agree that a small portion of it is protected by common law privacy and must be withheld under section 552.101 on that basis. As for the remaining information, we find that, even if it could be considered highly intimate or embarrassing, it is of legitimate public concern. *See* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and circumstances of his resignation or termination), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). We have marked the types of information that must be withheld under section 552.101 on the basis of common law privacy.

You assert that the officers' birth certificates are excepted under section 552.115 of the Government Code. This section provides that a birth record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from required public disclosure except that "a birth record is public information and available to the public on and after the 50th anniversary of the date of birth as shown on the record filed with the bureau of vital statistics or local registration official." Section 552.115 only applies to a birth certificate maintained by the bureau of vital statistics or local registration official. In this case, the city maintains the requested records as the employer of these officers. We therefore conclude that the city may not withhold the birth certificates pursuant to this provision. *See* Open Records Decision No. 338 (1982).

In addition, you assert that certain information concerning the officers must be redacted pursuant to section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of a peace officer regardless of whether the officer requests confidentiality under section 552.024.² You indicate that the individuals at issue were licensed peace officers on the date the city received this request. Therefore, we agree that, under section 552.117, the city must withhold the listed information concerning these individuals. We have marked the types of information that the city must withhold.

As you note, the requested information also includes photographs of the officers. Section 552.119 excepts from public disclosure a photograph of a peace officer that, if released, would endanger the life or physical safety of the officer unless one of three exceptions

²"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

applies. The three exceptions are: (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. Gov't Code § 552.119(a)(1)-(3). This section also provides that a photograph made exempt from disclosure by this section may be made public only if the peace officer gives written consent to the disclosure. *Id.* § 552.119(b); *see also* Open Records Decision No. 502 (1988). The photographs at issue depict peace officers, and it does not appear that any of the exceptions are applicable. You have not informed us that the peace officers have executed written consents to disclosure. Accordingly, the city must withhold these photographs.

You also assert that the information you have submitted as Exhibit 12 constitutes test items that you wish to withhold. Section 552.122 of the Government Code excepts from disclosure "a test item developed by a . . . governmental body[.]" Gov't Code § 552.122(b). In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes "any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated," but does not encompass evaluations of an employee's overall job performance or suitability. *Id.* at 6. The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); Open Records Decision No. 626 at 8 (1994).

You state that release of the information submitted as Exhibit 12 would "give an advantage to police recruits." Having considered your arguments and reviewed the submitted information, we agree that the questions submitted in Exhibit 12 constitute test items under section 552.122 of the Government Code. We also find that the responses to these questions tend to reveal the questions themselves. Thus, section 552.122 also is applicable to those responses. We have marked the information in Exhibit 12 that the city may withhold pursuant to section 552.122.

You also contend that a portion of the submitted information is excepted under section 552.130. This section excepts from disclosure "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." We have marked the types of information that the city must withhold pursuant to section 552.130 of the Government Code.

Finally, we note that some of the submitted information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright

law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, medical records such as those that we have marked may only be released in accordance with the MPA. The officers' W-4 and I-9 forms may only be released in accordance with the respective federal law governing each type of document. Pursuant to section 552.101, the city must withhold the following types of information, which are made confidential by the statutes indicated: 1) law enforcement records such as report 010012003 that pertain to identifiable juveniles (section 58.007 of the Family Code), 2) files, reports, records, communications, and working papers, such as the narrative that we have marked, that were used or developed in an investigation under chapter 261 of the Family Code or in providing services as a result of an investigation (section 261.201 of the Family Code), 3) any CHRI that the city has in its possession that falls within the ambit of the applicable federal and state regulations (section 20.21 of title 28 of the Code of Federal Regulations and sections 411.084 and 411.087 of the Government Code), 4) declarations of medical condition and of psychological and emotional health concerning these officers (section 1701.306 of the Occupations Code), and 5) information acquired from a polygraph examination (section 1703.306 of the Occupations Code). We have also marked the types of information that must be withheld under section 552.101 in conjunction with common law privacy. The officers' present and former home addresses and telephone numbers, social security numbers, and family member information must be withheld pursuant to section 552.117(a)(2). Under section 552.119, the city must also withhold photographs depicting the peace officers unless the officers have consented to their release. We have marked the types of motor vehicle record information that the city must withhold pursuant to section 552.130. The remaining types of requested information must be released in accordance with applicable copyright laws.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the

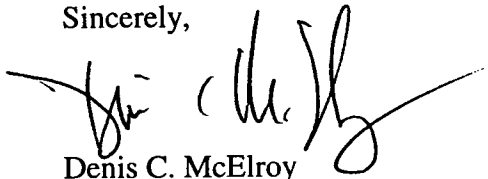
governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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DCM/sdk

Ref: ID# 184901

Enc. Submitted documents

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